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Supreme Court, U.S.
FILED
AUG 12 2005
OFFICE OF THE CLERK

No. 04-1264

IN THE

Supreme Court of the United States

BUCKEYE CHECK CASHING, INC.,
Appellant,

v.

JOHN CARDEGNA AND DONNA REUTER ON BEHALF OF THEMSELVES AND THOSE SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICI CURIAE* FINANCIAL SERVICE CENTERS OF AMERICA, INC., CALIFORNIA FINANCIAL SERVICE PROVIDERS AND THE ASSOCIATION OF OHIO CHECK CASHIERS, INC., D/B/A OHIO ASSOCIATION OF FINANCIAL SERVICE CENTERS, IN SUPPORT OF APPELLANT

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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STATEMENT OF INTEREST

The instant *amici curiae* are the Financial Service Centers of America, Inc. ("FiSCA"), a non-profit New Jersey corporation, and two of its state affiliates, the California Financial Service Providers, a California non-profit corporation, and The Association of Ohio Check Cashiers, Inc., d/b/a the Ohio Association of Financial Service Centers, an Ohio non-profit corporation. All three participating *amici curiae* are referred to as "FiSCA."[1] FiSCA is intensely concerned with

[1] Written consent to the filing of this brief has been obtained in accordance *with Supreme Court Rule* 37.3(a). This brief was prepared solely by counsel for FiSCA. No person or entity other than the *amici*

this matter because it will impact enormously on the ability of non-bank financial institutions to provide consumers with a wide variety of financial services at costs effectively established by fair market prices.

The broad scope and enforceability of arbitration clauses in supplying consumer financial services constitute two of the most vital pillars supporting rigorous competition to provide those services at the lowest possible prices. By containing the costs and business disruption attendant on consumer disputes, arbitration has fostered the development of a wide variety of differently configured non-bank financial institutions. They range from very small, single store "Mom and Pop" businesses to publicly traded companies with thousands of locations nationwide.[2] The dispute resolution mechanisms

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curiae has made a monetary contribution to the preparation or submission of this brief, except for membership dues and affiliate levies collected in the normal course of the operations of the *amici curiae* three trade associations. Appellant Buckeye Check Cashing, Inc. is a member of both FiSCA and the Ohio Association of Financial Service Centers, to both of which *amici* appellant pays only dues generally imposed on all members in the normal course of conducting the associations' regular business activities.

[2] In 1997 Coopers & Lybrand conducted a study of America's non-bank financial institutions for the United States Treasury Department. The resulting report found the check cashing industry to be "the most fragmented" segment of the non-bank financial institution industry. Coopers & Lybrand, *Non-Bank Financial Institutions: A Study of Five Sectors*, at 40 (1997). There is much greater business concentration among the single product, or "monoline", companies providing the short term, small dollar loans denominated payday advances ("PDAs"), or payday loans. As of the close of 2003, the three largest monoline PDA lenders were Advance America, with approximately 2,250 locations and CNG Financial and Check into Cash, both with about 900 stores. In contrast, the "multiline" (offering a significant diversity of financial products) segment of the PDA industry was led by Ace Cash Express with 867 stores, Cash America with 552 locations and Dollar Financial Group with 320 facilities. Stephens Inc., *Industry Report: Payday Loan Industry*, at 9 (2004).

of the *Federal Arbitration Act*, 9 U.S.C. § 1 *et seq.* ("FAA"), have made possible vigorous price and non-price competition among these businesses, many of whom are FiSCA members.

FiSCA has over 6,000 member locations, approximately two-thirds of which provide short term, low dollar value loans to consumers. Those transactions are referred to colloquially as payday advances ("PDAs") or payday loans. *Amicus curiae* Ohio Association of Financial Service Centers has 47 member companies with well over 300 financial service center locations. The California Financial Service Providers has nearly 2,000 member locations. PDAs are provided at almost all member locations of the latter two *amici curiae*. Although those *amici curiae* are state affiliates of the national trade association (*i.e.*, FiSCA), not all members of those two state associations are also members of the national association.

Amicus Curiae FiSCA has existed since 1987. Various of its state affiliates predate substantially the formation of FiSCA.[3] Established to represent the members of the growing non-bank financial services industry, FiSCA was originally known as the National Check Cashers Association. From its inception in the 1930s, largely as a response to the banking practices of the Depression era and changes in employer payment practices, the financial service center industry has evolved to become the pivotal link to the payments system for millions of Americans. These individuals opt for convenience or reasons of personal preference to use FiSCA members' facilities instead of the traditional banking system.

Just as many consumers prefer the convenience of specialty stores to large department stores, so, too, do many consumers in selecting the convenience of financial service centers over

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[3] The Financial Service Centers of New York was established in 1957. Another FiSCA affiliate, the Community Currency Exchange Association of Illinois, was founded in 1937.

banks. The importance of this convenience factor is supported by empirical research which shows that nearly 60 percent of FiSCA member customers maintain a savings or checking account at a bank or credit union. Eric Mower and Associates, *FiSCA Customer Satisfaction Research: Final Report*, at 6-10 (2000). They prefer doing business with FiSCA members because of the nearby neighborhood locations, longer hours of operation and the friendly service they receive.

The growth of the industry was stimulated, in part, by the passage of the *Depository Institutions Deregulation and Monetary Control Act of 1980*, Pub.L. 96-221 (Mar. 31, 1980), which removed deposit rate ceilings and led to explicit pricing for bank deposit services. Faced with a new banking environment, consumers demanded increased convenience and lower costs in fulfilling their financial services needs. As a result, community-based check cashing centers, which provide more convenient access to financial services, were utilized increasingly. Also, increases in fees charged by traditional banks have caused many Americans to seek less costly, fee-based options that do not require customers to maintain large average daily balances.

In 2000, FiSCA adopted its present name to reflect how traditional check cashers metamorphosed into enterprises that supplied many different products, including numerous financial services, among which are PDAs.[4] Most of the FiSCA member locations making PDAs are known as "multiline" stores. This is in contrast to "monoline" locations at which the financial transactions are limited effectively to PDAs only.

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[4] Coopers & Lybrand, *Non-Bank Financial Institutions: A Study of Five Sectors, supra* at 39.

A "multiline" PDA lender supplies the public with both PDAs and other, more traditional consumer financial products, such as:

- Wiring funds to third parties;
- Disbursing cash to money remittees;
- Selling and cashing money orders;
- Supplying bill payment services;
- Cashing checks;
- Exchanging currency;
- Selling prepaid telephone cards, bus cards and subway tokens/card;
- Offering tax preparation services; and
- Providing accounting/bookkeeping assistance to individuals and small businesses.

Various ancillary goods may be available at a neighborhood financial service center. In some instances, financial service centers are affiliated by common ownership with other enterprises, such as small grocery stores or bodegas.

Most states regulate financial service centers in one way or another, frequently using the same regulatory agencies that oversee banks and credit unions. State regulators often set rates for fees that can be charged for certain services and the marketplace also functions to keep prices low for consumers. New players are entering the market. Some banks and credit unions have opened stand alone check cashing operations. Major national retailers, such as Wal-Mart and 7-Eleven, have launched financial service facilities that provide check cashing, money wiring and money order sales. All of this has created a more competitive marketplace and additional consumer options.

Financial service centers have survived for decades despite demographic shifts, massive social changes and technological innovations. These businesses successfully adapted themselves to new commercial conditions with new products to replace out-moded product lines. Most FiSCA members are family-owned and operated enterprises. They frequently pass from generation to generation within the same family. Yet it is still fairly common to find the daughters and sons of proprietors striking out on their own in new locations with a somewhat different mix of products.

This phenomenon is facilitated by the relatively low economic barriers confronting new entrants into the industry. Most state regulations mandate only modest levels of "net worth" and "liquidity." Physical locations are normally leased, so that the most costly items are store fit-up, operating cash and regulatory compliance. In most geographic areas, a financial service center can be established and operated for an initial investment of $250,000 to $500,000.

This ease of entry into the industry always has encouraged participation by members of new immigrant groups. Hence, the ethnic background of financial service center operators includes many Hispanics, Africans, Asians and Eastern Europeans.

Because arbitration clauses invoking the FAA are standard provisions in PDA agreements under which FiSCA mem bers provide small dollar value, short term loans, this case implicates interests vital to FiSCA. As discussed below, the continued viability of small enterprises, as well as the financial health of larger lenders, is closely linked to the ready availability of arbitration proceedings under the FAA to afford consumers the swift, sure and inexpensive resolution of claims.

SUMMARY OF ARGUMENT

The judgment under review contravenes both the express terms of the FAA and the separability doctrine recognized in this Court's seminal decision in *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04, 87 S.Ct. 1801, 1805-06 (1967). *Prima Paint* established conclusively that arbitration was statutorily mandated whenever "the making of an agreement to arbitrate" was proven, irrespective of any state law based challenge to the enforceability of the obligations contained in the remainder of the written contract. 9 U.S.C. §4; *Prima Paint, supra*. Congress has succeeded in its legislative goal for the FAA: fostering the growth of interstate commerce by providing consumers and merchants an inexpensive, quick and informal method for conflict resolution. Certainty encourages commerce. Without it, business investments become riskier and product costs inevitably increase.

The *ad hoc* application of state "public policy" to preclude the enforcement of a wholly valid "agreement to arbitrate," 9 U.S.C. §4, vitiates many benefits that the FAA was meant to establish. The resulting uncertainty impairs significantly the ability of FiSCA's members to sustain themselves against the prospect of incurring the ever escalating expense of proceeding in court. Consumers and enterprises of every size are best served by the vigorous enforcement of arbitration agreements. State public policy can be vindicated before arbitrators and through many other means. The shifting vagaries of fifty states' *substantive* public policy cannot justify eviscerating the federal policy of the FAA to guarantee contracting parties access to an alternative dispute resolution procedure.

ARGUMENT

I. CIRCUMSCRIBING THE FEDERAL ARBITRATION ACT'S SCOPE BY THE *AD HOC* APPLICATION OF STATE LAW WOULD DEFEAT PARAMOUNT FEDERAL INTERESTS IN FOSTERING INTERSTATE COMMERCE.

Enactment of the FAA, 9 U.S.C. §1 *et seq*., unquestionably established that the enforcement of arbitration agreements was a *national* policy. Congress utilized its authority under the Interstate Commerce Clause to serve as the foundation for the FAA. U.S. Const., Art. I, §8; see *Allied-Bruce Terminex Companies et al. v. Dobson*, 513 U.S. 265, 273-75, 115 S.Ct. 834, 839-40 (1995). Under this statute, arbitration agreements were to function as a mechanism for enhancing the economic development of the country as a whole by providing powerful assurances of stability to those who invested, conducted business and participated in interstate commerce. The FAA has served those interests effectively for the past 80 years, during which the American economy prospered to the point that it has become the world's finest engine for creating and distributing goods and services to consumers.

The ever-increasing prevalence of arbitration clauses in consumer transactions is a testament to the importance merchants attach to the availability of swift, inexpensive and non-disruptive dispute resolution under those contract provisions. Some goods and services, such as new automobiles, swimming pool installations and stockbroker services, would be both severely restricted and much more expensive if purchaser/seller disputes could not be resolved through arbitration. The same is true of the PDA industry in which the small dollar amount of each transaction (almost always less than $500) cannot coexist with the disruptive, dilatory and costly remedies prevalent in judicial forums that evolved under the

common law tradition. Mogilnicki and Jensen, *Arbitration and Unconscionability*, 19 Ga. St. U. L. Rev. 761, 768 (2003).

Saliently, the FAA reversed centuries of judicial hostility to alternative dispute resolution. This nullified long-standing shibboleths such as "the law disfavors arbitration" or that "any agreement in derogation of the court's authority violates public policy" or that "arbitration agreements are to be strictly [narrowly] construed." See *Allied-Bruce Terminex*, *supra*, 513 U.S. at 270, 115 S.Ct. at 838. Not only were those hoary principles incompatible with economic conditions in twentieth century America, but the original underlying reason for their development was eliminated effectively by the middle of the nineteenth century in a series of administrative reforms that divorced judicial compensation from the amount of fees paid by the litigants.[5] Whether the survival of the courts' residual antipathy to arbitration stems merely from a misapplication of *stare decisis* has been questioned by this Court. *Id*. Sometimes opposition to arbitration as a *procedure* may mask underlying concerns about *substantive* social policy. Cf. Paul Carrington, *Unconscionable Lawyers*, 19 Ga. St. U. L. Rev. 361 (2003).

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[5] Judges at common law were paid only nominal salaries by the crown/state. They derived the bulk of their compensation from the fees paid by the parties whose cases they heard. This arrangement extended to the puisne judges and the chief justice of the Court of King's Bench, England's highest law court. John, Lord Campbell, C.J., *The Lives of the Chief Justices of England*, Vol. IV at 37, n.1 (1873). Diversion of judicial business to arbitration threatened the judges' livelihoods, as did early resolution of the cases brought before them. Although by the dawn of the twentieth century, virtually all judicial compensation was uncoupled from the collection of litigant fees and the number of cases on the court calendar, vestiges of the old system persisted for some time. Some of these anachronisms have been struck down on federal constitutional grounds for being inconsistent with due process principles or incompatible with specific guarantees of the bill of rights. See, e.g., *Connally v. Georgia*, 429 U.S. 245, 250-51, 97 S.Ct. 546, 549 (1977).

As a matter of federal statutory policy, arbitration is now a *favored* method of dispute resolution, especially favored over traditional judicial proceedings. This alternative to litigation has enabled a plethora of small businesses to participate in proffering to American consumers many kinds of goods and services that *originate* with those tiny economic units.[6]

"Mom and Pop" companies and embryonic enterprises can be stifled by legal expenses attendant on the wildfire expansion of suits. It really does not matter whether the asserted claim(s) are viable, or even if summary disposition mechanisms (*see, e.g.*, Fed. R. Civ. Pro. 56) might abort lengthy court proceedings.

The very existence of a pending suit engenders judicial costs, attorneys fees and business disruption that easily can swamp a modestly sized local enterprise. Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Service Providers*, 1472 PLI/Corp. 249, 253 (2005). As a matter of sheer survival, these merchants are compelled to settle with aggressive plaintiffs' lawyers, irrespective of any fault of the businesswoman or businessman. *Id.* The perils of finding themselves in that sort of dilemma

[6] A small company that *creates* consumer goods and services is very differently situated from one which sells at retail goods manufactured or distributed by another. In the latter case, the most substantial risk arises from product(s) liability claims, but the law generally allocates ultimate financial responsibility to the entity that created the defect in the product. *Restatement (Third) of Torts; Prod. Liab.*, §1. A defendant retailer can employ various means to transfer liability to the product's distributor, which in turn normally can bring in the product's manufacturer as the ultimately responsible party. *E.g., Fed. R. Civ. P. 14*; *Uniform Apportionment of Tort Responsibility Act*, §1 *et seq.* (2003). The manufacturer is able to insure against the loss by spreading the cost of insurance over all its products made and sold into the distributional pipeline. This system of risk allocation cannot alleviate the dangers to a small business that *itself* creates consumer financial services. Only through enforceable arbitration clauses can a tiny economic entity hope to sustain itself while also affording its customers fair remedies.

can force entrepreneurs to cease conducting transactions in those goods and services. Most perniciously, potential entrants to the market are discouraged from commencing business by the prospect of absorbing the non-productive expenses of threatened consumer litigation.[7]

II. GUTTING THE FEDERAL ARBITRATION ACT IS NOT A PREREQUISITE TO THE VINDICATION OF STATE AUTHORITY TO ENFORCE PUBLIC POLICY.

Lingering apprehensions about the potentially negative impact of arbitration proceedings on the enforcement of *state*

[7] Under established economic doctrine, consumers benefit from reduced business costs, the savings from which are reflected in price and non-price (superior services, convenience etc.) competition. There is no reason that these universal principles would not apply to the savings associated with the use of arbitration as a less expensive dispute resolution mechanism than in courts. See, *e.g.*, Stephen J. Wore, *Paying the Price of Process; Judicial Regulation of Consumer Arbitration Agreements*, J. *Dispute Resol.* 89, 93 (2001). There have been challenges to this proposition on the ground that "perfect competition" rarely exists in the provision of consumer financial products due to economic entry barriers. Jean R. Sternlight and Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practices or Unconscionable Abuse?, 67 SPG Law & Contemp. Probs*. 75, 92-94 (2004). As demonstrated in this brief, there are very few entry barriers confronting new financial service centers and the provision of PDAs to consumers. The PDA marketplace in California is illustrative of vigorous competition. Scores of advertisements for different PDA companies appeared in last year's San Diego, California Yellow Pages. *2004 Yellow Pages, San Diego, California* at 298 to 299; 704 to 708. Some of these advertisements stress non-price competition through speedy transactions (Money Tree-PDAs "in just minutes;" Cashman—"Cash Advance in 5 minutes or less") or extended days and hours of operation (Western Check Cashers—"Open 7 days") Others expressly offer PDAs at prices well below the statutorily authorized 15% rate cap (*e.g.*, Advance Check Services—"50% OFF!" for new customers; All City Financial—"10% Payday Advance"). *Id. See California Deferred Deposit Transaction Law*; Cal. Fin. Code §23000 *et seq.*

substantive public policy are chimeras. These fears cannot be allowed to nullify the *federal public policy* favoring *procedural* recourse to alternative dispute resolution authorized under the FAA. When one clears away analytically all the catch-phrases, such as "void *ab initio*," "voidable" and "inherently unlawful," along with all the window dressing designed to distinguish the indistinguishable doctrine of *Prima Paint*, there remains at best a suspicion that arbitrators somehow might enforce contract provisions in a way that would contravene controlling precepts of state law. But nothing in the FAA precludes a state from exercising the full range of its police powers to remedy wrongs, including those that might arise from a contract that contains an arbitration clause.

In its decision below, the Florida Supreme Court distorted this Court's separability doctrine articulated in *Prima Paint*, *supra*, 388 U.S. at 403-404, 87 S.Ct. at 1806. That doctrine holds that the enforceability of an "agreement to arbitrate" contractual disputes must be determined without reference to the wholly distinct issue of whether the remainder of the contract is itself valid and enforceable. *Id.*

While discussing the very circumscribed judicial role in implementing the FAA, Justice Fortas noted in *Prima Paint* that courts would retain some authority over certain types of defenses to a demand that a party submit to arbitration. *Id.* These "pre-arbitration" defenses, sometimes characterized at common law as "real defenses," were focused on the basic mechanics through which contractual obligations are formed. In the main, these defenses were concerned with whether a party "assented" to the contract, rather than whether the party might have misunderstood the contract's import or relied on extra-contractual representations. *Id.*

"Real defense" challenges to contract formation might include claims:

- of forgery of a party's signature to a written instrument;
- that a party signed a different document whose signature page was appended to some other writing; and
- of an incapacity to contract, as with a minor or a mentally impaired person for whom a guardian has been appointed by a court.

Successfully proving any of these defenses would negate the "existence" of any valid contract, including the agreement to arbitrate disputes lodged within the instrument, but that would mean that the arbitration clause itself was unenforceable because no "agreement to arbitrate" was ever formed.

Prima Paint's holding did not preempt judicial jurisdiction over disputes relating to whether the requisite mechanics of contract formation were satisfied.[8] With the failure of those proofs, it might be said that "no contract was ever formed." This verbalization is echoed in the Florida Supreme Court's decision below. *Cardegna et al. v. Buckeye Check Cashing*, Inc., 894 So. 2d 860, 863 (Fla. Supreme Ct. 2005) ("[T]he underlying contract would be rendered void from the outset if it were determined that the contract . . . violated Florida's usury laws.").

Verbal prestidigitation was employed below to confound the concept of a fatal evidential deficiency in the mechanics of contract formation, in which case "no contract was ever formed," with the substantive public policy issue of whether the content of a contract so taints its terms that it is unen-

[8] Even if the FAA allowed states to resolve these issues in pre-arbitration proceedings, states remain free to permit arbitrators to address those claims. *E.g., Uniform Arbitration Act* (2000).

forceable. Whether a state court mischaracterizes both of these very different situations as being governed under state law by the "void *ab initio*" doctrine cannot affect the applicability of the FAA. As long as the contract's "arbitration agreement" received proper assent, under the forum selection provisions of the FAA it is completely irrelevant how offensive the balance of the contract may be to state law.[9]

The survival of residual judicial hostility to arbitration is almost unfathomable when considered against the actual experience of consumers who participate in alternative dispute resolution. There is no indication at all that consumer claims and/or defenses are not considered fairly by neutral arbitrators who apply the same legal principles as would a court considering the identical issues. Ernst & Young, *Outcomes of Arbitration—An Empirical Study of Consumer Lending Cases*, 2 to 3 (2004). The only difference is that the arbitration award is rendered more quickly and less expensively than generally is attainable through the judicial process.

Meticulous efforts to assure fairness are the hallmarks of contemporary arbitration clauses in consumer contracts. This is understandable because vendors of goods and services who seek to invoke the FAA are aware in the first instance that

[9] A litigant almost would have to be deranged to invoke the FAA to enforce substantive contract terms that flagrantly flaunt public policy. An arbitrator would be expected to act fairly and enforce the public policy. Perhaps even more significantly, the losing party would remain exposed to penalties imposed in administrative hearings and judicial proceedings by state officials charged with enforcing the public policy. Because § 4 of the FAA requires the institution of suit in the appropriate federal district court, the complaint and contract in dispute become public documents readily available to state and local officials as well as the press and the community at large. Rational litigants would shun the invocation of the FAA when it would entail the disclosure of unseemly practices. This "publicity" aspect of the FAA buffers the statute from becoming a device to circumvent state public policy. The practical significance of the "disclosure" requirements of the FAA are discussed at greater length, *infra*.

the FAA's benefits are conditioned on the availability of equitable, litigant-friendly arbitration procedures. *Green Tree Financial Corp.–Alabama et al. v. Randolph*, 531 U.S. 79, 89 to 92, 121 S.Ct. 513, 521-523 (2000).

The advantages of arbitration are only available when the agreement to arbitrate is enforceable. Excessively onerous, one-sided arbitration provisions/procedures may be subject to attack on "unconscionability" grounds derived from general principles of state law. *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practices or Unconscionable Abuse?*, *supra*, 67 *SPG Law & Contemp. Prob.*, *supra* at 77-78. To avoid triggering that nearly universal defense in consumer disputes, it is in the self-interest of the business community to afford consumers inexpensive, easily invokable procedural rights in the arbitration process. Almost any rational merchant would prefer to advance the arbitration fee(s) for a consumer claimant than to incur the financial burdens inherent in engaging even the most reasonably priced attorney's services in judicial proceedings. Informal consumer arbitration procedures do not require representation of a respondent business by lawyers. Managers of businesses can appear in defense of consumer claims being resolved in arbitration. Similarly, the arbitration process does not entail the payment of court filing fees or the costs of serving original process through a sheriff, bailiff or other public officer. Cf. Joseph M. Matthews, *Consumer Arbitration*, 79 APR. Fla. B.J., 22, 24-27 (2005).

Consumer contract arbitration clauses typically invoke application of the rules of a non-profit national institution, which also is designated to administer the arbitration. Among the principal institutions overseeing the arbitration of consumer contract claims are the American Arbitration Association and the National Arbitration Forum ("NAF"). In her separate opinion in *Green Tree Financial Corp.-Alabama et al. v. Randolph, supra* 531 U.S. at 95-96, 121 S. Ct. at 524

to 525, Justice Ginsberg noted with approval the special pro-consumer arbitration rules adopted by the American Arbitration Association. The other institutional arbitration administrators have manifested similar sensitivity in accommodating consumer contract claims. For example, three years ago the NAF promulgated an arbitration "bill of rights" whose initial "principle" stresses the NAF's commitment to a "fundamentally fair process." National Arbitration Forum, *Arbitration Bill of Rights with Commentary* (2002).

Very early in the emergence of the PDA industry, *amicus curiae* Financial Service Centers of America emphasized the requirement that its members providing PDA services are obliged to treat borrowers with fairness in every aspect of a PDA transaction. This duty extends to the remedies and remedial procedures specified in a PDA agreement.

In 1998 FiSCA became the first national trade association to impose on its members a written code of conduct governing PDA transactions. *Financial Service Centers of America, Inc., Code of Conduct* (1998). That code of conduct has been amended periodically and remains in force. (www.fisca.org). Violations of the Code of Conduct by FiSCA members are subject to organizational sanctions, including "expulsion" from FiSCA. *Id.* In an effort to promote the use of equitable and enforceable arbitration agreements in PDA transactions, six years ago FiSCA published a "model arbitration clause" for use by its members. *Id.* FiSCA's model arbitration agreement is modified as necessary to enhance the rights of individual consumers and conform to applicable legal developments. At present, the "model" arbitration provision invokes the consumer friendly procedures of the National Arbitration Forum. *Id.*

That a consumer gets a "fair shake" and even more in an arbitration forum is confirmed by the overwhelming majority of empirical studies on that subject. See, *e.g.*, Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases*, *supra* (February 2005) http://www.arbforum.com/media/EY_2005.pdf); Louis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998). A consumer is more likely to prevail in a consumer credit arbitration than a business. Recent empirical data shows that consumers are more likely than businesses to obtain a favorable outcome, with 55% of arbitrations resolved in favor of the consumer. *Id.* Consumers not only have a positive experience in arbitration, but also are typically satisfied with the arbitration process. According to the *Ernst & Young* study, more than two-thirds of consumers are either satisfied or very satisfied with the arbitration process. *Id.*

Favorable consumer outcomes through arbitration are not unique to consumer lending. For example, in the employment arena, the benefits of arbitration to the individual employee are just as evident. When employment claims are filed in federal court, individual plaintiff employees prevail in just under 15% of the cases against corporations. *Maltby, Private Justice: Employment Arbitration and Civil Rights*, *supra* at 46. In stark contrast, the NAF reports a success rate of 63% when individuals bring employment claims against corporations in arbitration proceedings. *National Arbitration Forum, Bill of Rights with Commentary, supra.* The extent of the relief obtained by individuals in NAF arbitrations exceeds by over one-third the relief awarded in federal court for the same type of claims. *Id.*

State "public policy" is enforced as a matter of course in arbitrations. The institutional administrators of those proceedings require that arbitrators enforce the substantive law and impose remedies in conformance with that law. See, *e.g.*, *National Arbitration Forum, Arbitration Bill of Rights with Commentary*, Principle 12. AWARDS AND REMEDIES (NAF arbitrators must "swear an oath to decide arbitrations under the applicable substantive law")

Finally, arbitrations neither threaten nor impair the vindication of a state's public policy. The result of a decision in a simple dispute between private parties hardly can be said to imperil statewide substantive law. This is true whether the dispute is resolved by a court or by an arbitrator. In this context, the practical "finality" of arbitration awards cannot be considered to detract from the benefits of arbitration. The mere availability of appellate review of a judicial decision cannot guarantee that the judgment conforms strictly to state law. Given the often cramped scope of appellate review, litigants who can afford an appeal still may find themselves saddled with a judgment incompatible with the objective application of state law. These situations merely reflect the marginal impact of idiosyncratic factors. They may include the extent of the experienced or astuteness of a judge, the relative diligence of counsel for the parties in preparing for trial and presenting their respective clients' cases or an imbalance in the extent of resources that can be invested in a trial.

The instant case is a graphic illustration of why enforcement of a state's public policy is impervious to the resolution in arbitration of disputes relating to that public policy. In their initial pleadings, filed with Florida's courts, plaintiffs' principal claim is that the terms of the agreements they entered into are usurious and contrave various Florida statutes, including the proscriptions against "criminal usury" *Fla. Stat. Anno. XXXIX*, §687.071. This statute was the foremost source of that state's "public policy" identified in the Florida Supreme Court's opinion below as potentially posing an insuperable barrier to application of the FAA. *Cardegna et al. v. Buckeye Check Cashing, Inc., supra*, 894 So. 2d at 864 to 865.

As discussed above, an arbitrator can read and digest the plaintiffs' claims and the legal authority(s) underlying those claims. Whatever award the arbitrator makes, Florida's prohibitions against usury will continue in full force and effect.

When it enacted the FAA in 1925, Congress never intended to invade the indubitable plenary police powers of states to enact substantive law controlling contracts' subject matter, terms and remedies. But Congress did intend to promote interstate commerce by creating controlling federal authority to guarantee an alternative dispute mechanism to resolve wholly private claims, irrespective of the subject matter of the disputes.

Florida's paramount mechanisms for proscribing the practice of usury have nothing whatsoever to do with enforcement of the FAA as it was construed in *Prima Paint*. Rather, by statute the Florida Legislature has conferred on executive branch officials the responsibility for preventing usury and affording relief to its victims. "Criminal usury, loan sharking" and "shy-locking" are expressly proscribed by *FLA. Stat. Anno. XXXIX*, §687.071. Violations are second degree misdemeanors when the annual interest rate exceeds 25% and is less than 45%. *Fla. Stat Anno. XXXIX*, §687.071 (2). If the annual interest rate exceeds 45%, criminal usury is an indictable crime of the third degree *Fla. Stat. Anno. XXXIX*, §687.071(3). Prosecutions for violations of §687.071(3) can be instituted by any of the state attorneys in Florida's 67 counties or by the Florida Attorney General. Express self-executing grants of transactional and use immunity are provided by statute to further both judicial and investigative proceedings, including for "any violation" of §687.071. Because this statute makes unenforceable, in Florida's courts, the collection of a usurious debt, it appears that these extraordinarily broad immunity provisions are applicable generally in civil "proceedings", including in FAA arbitrations. *Fla. Stat. Anno. XXXIX*, §687.071 (6) and (7).

Florida's RICO law establishes another instrumentality for enforcing that state's proscriptions against criminal usury. The "collection of an unlawful debt" comprises one of the specifically defined forms of conduct encompassed by the

state RICO statute and indictable criminal usury constitutes a "predicate crime" under the definition of "racketeering activity." *Fla. Stat. Anno. XLVI*, §895.02(1)(a)(19); *Fla. Stat. Anno. XLVI*, §895.03(1).

In this case the administrative authority conferred on Florida's banking authorities was also available to remedy any possible unlawful practices of appellant Buckeye Check Cashing, Inc. That company is a check casher "registered" under Florida law. *Fla. Stat. Anno. XXXIII*, §560.301 *et seq.* (Florida's "Check Cashing and Foreign Currency Exchange Act"). At the time the transactions at issue were conducted, they proceeded under a statutorily established fee protocol accepted by the state banking authorities responsible for implementing and enforcing compliance with the licensing statute and regulations. *Fla. Stat. Anno. XXXIII*, §560.309. Transactions under that protocol were conducted openly throughout the state with the full knowledge of state officials. If Florida's "public policy" was being flouted, the officers primarily responsible for enforcing that public policy did not perceive any violations.[10]

Plaintiffs' claims stem from their disagreement with the responsible state public officials on how to construe the pertinent provisions of Florida's laws. That disagreement was, and is, a matter plaintiffs should have addressed, and may still address, in the available legislative and administrative arenas. The key point is that Florida's public policy against usury can be vindicted in many different ways by many different officials. Enforcement of the FAA's benign forum selection provisions in this case is completely unrelated to preserving the integrity of whatever Florida public

[10] Since the dates of the transactions at issue in this matter, Florida has authorized PDA's under a licensing statute that provides for essentially the same fees as were charged under the prior protocol by licensed check cashers. Compare *Fla. Stat. Anno. XXXIII*, §560.309 with *Fla. Stat. Anno. XXXIII*, §560.404.

policy may be resolved in the subsequent substantive phase of the arbitration proceeding to which the parties agreed.

CONCLUSION

For the reasons stated above, *amici curiae* respectfully urge that this Court reverse the judgment entered below by the Supreme Court of Florida and remand this matter with directions that respondents' claims be referred for resolution in arbitration in accordance with the Federal Arbitration Act.

Respectfully submitted,

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